IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 181 of 1988

For Approval and Signature :

HONOURABLE **MS. JUSTICE R.M.DOSHIT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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RAMANBHAI SOMABHAI PATEL & 4 - Appellant(s)

Versus

PATEL DAHYABHAI RAMABHAI & 2 - Defendant(s)

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Appearance :

MR MC SHAH for Appellants
RULE SERVED for Defendants

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 13/06/2007

ORAL JUDGMENT

This Appeal under Section 100 CPC preferred by the plaintiffs in Regular Civil Suit No. 235 of 1981

arises from the judgment and order dated 15th December, 1987 passed by the learned Assistant Judge, Nadiad in Regular Civil Appeal No. 43 of 1985.

The plaintiffs instituted above referred Regular Civil Suit No. 235 of 1981 in the Court of learned Civil Judge [JD], Borsad for removal of encroachment and for permanent injunction. The plaintiffs and defendants are the agriculturists and residents of village Kantharia, Taluka-Borsad. They have their houses situated around the suit land. The suit land being the open land for common use and passage by the plaintiffs and the defendants. According to the plaintiffs, some four months before the date of the suit, the defendants nos. 1 & 3 encroached upon the part of the suit land and each constructed a shed to tether cattle and to store agricultural implements, leaving a narrow lane for passage by the plaintiffs. According to the plaintiffs, each of the defendants had some open land in front of their houses called "*Ravesh*". It was in this "*ravesh*" that each defendant used to tether the cattle and to store the agricultural implements. The plaintiffs, therefore, prayed that the defendants be

directed to remove the encroachment and to restore the open land for common use by the plaintiffs and the defendants. The suit was contested by the defendants by written statement Exh.14. The defendants denied that they had encroached upon the suit land or any part thereof and that the cattle sheds did exist and were being used by the concerned defendants to tether the cattle and for storage of agricultural equipments.

The learned Civil Judge decided the suit in favour of the plaintiffs. By judgment and decree dated 16th January, 1984 the suit was allowed and mandatory direction was issued to the defendants to remove the encroachment and permanent injunction was issued upon the defendants from encroaching upon the suit land or any part thereof.

Feeling aggrieved, the defendants preferred Regular Civil Appeal No. 43 of 1985 in the Court of learned District Judge, Kheda. The learned Assistant Judge, by the *impugned* judgment and order dated 15th December, 1987, allowed the appeal and dismissed the suit. Therefore, the present Appeal.

The Appeal is admitted to final hearing by this Court on the following substantial question of law :-

> **"Is it not necessary to consider the encroachment notice issued by the local authority with respect to the disputed land while deciding the ownership thereof without the local authority as part in the proceedings?"**

Mr. Shah has relied upon the site plan Exh.63. He has submitted that the parcels of land marked "ABCD" and "EFGH" are the alleged encroachment. He has submitted that the suit land is a rectangular piece of land and the disputed sheds are indeed encroachment on the suit land. Such encroachment has also caused damage to the plaintiffs in as much as the plaintiffs do not have sufficient space to move their articles. Mr. Shah has also submitted that there shall be a presumption that the open land like the suit land is for common use by all. Therefore also, the defendants could not have been permitted to retain the unlawful encroachment made by them. Mr. Shah has also submitted that the local authority [*Gram Panchayat*] also had passed resolution [*Exh.58*] directing the defendants to remove the alleged encroachment.

I am unable to agree with Mr. Shah. While considering the plea of the plaintiffs, the lower appellate court has relied upon the mortgage deed Exh.59 and the measurements of the house of the defendant no.1 recorded therein. Having considered such measurements, the learned Assistant Judge has held that the land of the disputed sheds belong to the concerned defendants and that they had a right to tether cattle there. The resolution Exh.58 was passed by the Gram Panchayat evidently on the complaint made by the plaintiffs and not after making the survey of the site. The said resolution cannot be said to be the proof of encroachment by the defendants or the proof of lack of title in the suit land of the defendants.

In my opinion, no question of law much less a substantial question of law arises in this Appeal. The Appeal is dismissed. There shall be no order as to cost.

{Ms. R.M Doshit, J.}

*Prakash**